

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

OFELIA SANDOVAL)	
Claimant)	
V.)	
)	CS-00-0162-035
STEPHANIE ROBERTSON-CAMERON, DDS)	AP-00-0450-252
Respondent)	
AND)	
)	
STATE FARM FIRE & CASUALTY CO.)	
Insurance Carrier)	

ORDER

Claimant requested review of the March 30, 2020, Award issued by Administrative Law Judge (ALJ) Gary K. Jones. The Board heard oral argument on July 16, 2020.

APPEARANCES

Terry Torline appeared for Claimant. Kelly Donley appeared for Respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board considered the same record as outlined in the Award and adopted the stipulations listed in the Award.

ISSUES

The issues on appeal are:

1. What is the nature and extent of Claimant's permanent impairment, specifically whether Claimant is entitled to a work disability?
2. Is Claimant entitled to future medical treatment?
3. Is Claimant responsible for the cost of Dr. Bishop's deposition?

Claimant argues she has a 19 percent body as a whole functional impairment and is entitled to an award of work disability.

Respondent contends Claimant has a 6 percent body as a whole functional impairment and is not entitled to work disability. Respondent further contends Claimant is not entitled to future medical treatment. Finally, Respondent contends Claimant should bear the cost of the deposition of Dr. Bishop.

FINDINGS OF FACT

The ALJ found Claimant suffered injury by repetitive trauma to her bilateral upper extremities on January 8, 2016, arising out of and in the course of her employment with Respondent. The ALJ further found: Claimant gave timely notice of her injury; Claimant is entitled to temporary total disability benefits (TTD) beginning October 2, 2017, for 42.57 weeks; there was an underpayment of TTD and Claimant is entitled to an additional payment of \$2,165.54; Claimant has a body as a whole functional impairment of 8 percent; Claimant is entitled to future medical, and Respondent is ordered to reimburse Claimant for the \$600.00 charge for Dr. Bishop's deposition.

Claimant was employed with Respondent from November 13, 2006, to October 1, 2017, as the front office coordinator. Claimant's employment ended for reasons which do not constitute voluntary resignation or termination for cause.¹ Claimant's job duties were answering the telephone, filing, checking patients in, pulling charts, inputting patient information into the computer system, sorting and distributing mail, accepting patient payments and making appointment reminder calls.

On and around 2014, Claimant developed numbness and tingling in her hands. Claimant sought medical treatment on her own and was diagnosed with arthritis. On January 8, 2016, Claimant saw a Dr. Goerl, who diagnosed Claimant with bilateral carpal tunnel syndrome and the condition was work-related. Claimant reported this diagnosis to her employer.

Claimant was then referred by Respondent for medical treatment with Dr. Pat Do. On July 28, 2017, Claimant received left carpal tunnel release surgery and right carpal tunnel release surgery on September 28, 2017. Claimant also received right and left lateral epicondyle releases.

Claimant was employed with Victoria's Secret from December 17, 2018, until February 19, 2019, as a seasonal cashier. She was paid \$11.00 per hour and worked part-time. The only record of earnings were from 2019 in the amount of \$696.00.

Claimant was employed from January 15, 2019, to March 25, 2019, at Center Industries as an expeditor. Claimant was paid \$13.00 hour and no fringe benefits. Claimant

¹ Stipulation filed March 5, 2020, wherein parties stipulated Claimant was not terminated for cause or did not voluntarily resign as defined in K.S.A.44-510e(a)(2)(E)(i).

was scheduled to work forty hours a week. Claimant was terminated due to unsatisfactory job performance. Her total earnings from Center Industries were \$4,629.70.

Claimant was hired as the scheduling coordinator and financial coordinator on April 12, 2019, with Hansen Orthodontics. Claimant is still employed there. Claimant is paid \$13.00 per hour and works 32 to 40 hours per week. Claimant does not have any fringe benefits.

Ms. Hansen of Hansen Orthodontics considers Claimant to be a good employee and is aware of Claimant's hand and elbow pain. Hansen Orthodontics explored some means of accommodating Claimant to ease her hand and elbow pain. Claimant submitted a letter of resignation in February 2019 on the recommendation from Dr. Murati. However that resignation has never occurred and Claimant continues to be employed with Hansen Orthodontics.

Since Claimant filed her workers compensation claim, she was in a vehicle accident. She suffered whiplash and pain to the low back, but no injury to her hands or elbows. Claimant continues to have symptoms of numbness, tingling, pain and swelling in her hands and elbows. Since Claimant began working for Hansen Orthodontics, she believes the symptoms in her hands and arms have worsened.

Steve Benjamin, a vocational rehabilitation consultant, conducted a task assessment of Claimant at the request of Respondent. He found there were 21 nonduplicative tasks performed by Claimant over the last 5 years. He opined Claimant retained the ability to engage in substantial gainful employment. Mr. Benjamin opined Claimant could earn wages in the amount of \$611.20 without fringe benefits. Using United States Department of Labor data from a 7 state region that includes Kansas the average estimate for fringe benefits is \$148.00 per week. Mr. Benjamin found Claimant to have a 22.5 percent wage loss based on the weekly wage of \$611.20. If fringe benefits were added to the average weekly wage of \$611.20 results in a 3.6 percent wage loss.

At the request of the Court, Dr. Pat Do evaluated Claimant on May 12, 2017. Claimant complained of pain, numbness and tingling in her bilateral upper extremities from the repetitive activities she performed for her employer. Dr. Do examined Claimant and diagnosed Claimant with bilateral carpal tunnel syndrome and left elbow lateral epicondylitis. He recommended bilateral carpal tunnel release and left elbow lateral epicondyle release with debridement. He opined Claimant's work activities were the prevailing factor in her need for treatment and any resulting impairment.

Claimant eventually underwent the surgical procedures recommended by Dr. Do, including right lateral epicondyle release. On August 9, 2018, Claimant was released at maximum medical improvement with no restrictions.

On September 4, 2018, Dr. Do rated Claimant's permanent impairment as 6 percent body as a whole impairment based on the *American Medical Association Guides to the Evaluation of Permanent Impairment, 6th Edition (The Guides)*. He did not recommend future medical treatment.

On May 2, 2019, Claimant returned to Dr. Do with bilateral hand pain, numbness and weakness. Dr. Do noted Claimant's symptoms had worsened and limited her daily activities and disrupted her sleep since being released at maximum medical improvement. Claimant was prescribed a wrist brace, anti-inflammatory medication, physical therapy and injections

After receiving the recommended treatment, Dr. Do found Claimant to be at maximum medical improvement on July 30, 2019. He assigned permanent restrictions of limiting repetitive gripping, grasping, pinching and vibratory tools at 34 to 66 percent of the day bilaterally. His permanent impairment opinion did not change.

Dr. Do reviewed Mr. Benjamin's task list and opined Claimant did not have a task loss.

Dr. Pedro A. Murati evaluated Claimant on August 13, 2018, at the request of her attorney. Claimant's complaints were sharp and aching pain in her elbows, arms and wrists bilaterally; numbness in the elbows, arms and wrists bilaterally; numbness and tingling in the fingers and elbows bilaterally with it being worse at night; pain with stretching hands; burning in elbows that radiates down into the hands; and swelling of arms bilaterally, with the right being worse.

Dr. Murati diagnosed Claimant with bilateral radial nerve entrapment; status post left elbow lateral epicondyle release with debridement; status left wrist carpal tunnel release; status post right carpal tunnel release; and status post right elbow epicondyle release debridement.

Dr. Murati opined the prevailing factor in the development of Claimant's bilateral upper extremity injuries is the multiple repetitive traumas at her work with Respondent, which exposed her to an increased risk she would not have had if she were unemployed.

Dr. Murati recommended permanent restrictions of: no repetitive grasp/grab with both hands; no lift/carry/push/pull greater than 35 pounds; no use of hooks or knives or vibratory tools; occasional use of repetitive hand controls; frequent lift/carry/push/pull of 20 pounds and; constant lift/carry/push/pull of 10 pounds.

Dr. Murati assigned a 19 percent body as a whole impairment, based on *The Guides*. Referencing Table 15-23 of *The Guides*, he assigned 8 percent right upper extremity impairment for the right carpal tunnel syndrome with status post carpal tunnel release and an additional 5 percent impairment for the right radial nerve entrapment.

Referencing Table 15-4 of *The Guides*, Dr. Murati designated a Class 1, 5 percent right upper extremity impairment for the right lateral epicondyle release. These ratings combine for a 17 percent right upper extremity impairment, which converts to 10 percent body as a whole impairment rating. Dr. Murati rated the impairment to the left upper extremity in the same manner as the right. Using the Combined Values Chart in *The Guides*, Claimant has a total 19 percent body as a whole impairment.

Dr. Murati opined Claimant needs future medical treatment, such as annual evaluations of her upper extremities, anti-inflammatory medications, possible physical therapy and injections.

Claimant met with Dr. Murati again on January 15, 2020, due to complaints of sharp and aching pain in her elbows, arms and wrists; stiffness in the elbows, arms and wrists; occasional numbness and tingling in her fingers and elbows; pain when stretching hands; burning in elbows that radiates down into her hands; swelling of the arms bilaterally, worse on the right; difficulty grasping items with hands; and dropping objects with the right hand. His diagnosis was the same with addition of persistent bilateral lateral epicondylitis.

Dr. Murati continued to recommend the same permanent restrictions as before with modification of the weight limits of what she should lift/push/pull/carry. He recommended: Claimant limit repetitive grasping/grabbing and lift/push/pull/carry to no more than 20 pounds; frequently 10 pounds; and constantly 5 pounds. No ladder climbing restriction was added. He impairment rating did not change, nor did his prevailing factor opinion. He continued to feel Claimant will need further medical treatment.

Dr. Murati reviewed Mr. Benjamin's task list and found Claimant has a 100 percent task loss. He reviewed the task list prepared by Mr. Torline and his client and found Claimant has 93 percent task loss.

Dr. Rodney Bishop evaluated Claimant on October 22, 2018, at the request of the Court. Claimant complained of constant pain in both hands and elbows, weakness in both upper extremities and tingling in her hands which she attributed to the work she performed for Respondent. Dr. Bishop examined Claimant and diagnosed her with bilateral carpal tunnel syndrome and bilateral lateral epicondylitis.

Dr. Bishop opined the prevailing factor for the diagnoses was the repetitive work activities Claimant performed during her employment with Respondent.

Dr. Bishop assigned an 8 percent body as a whole impairment, based on *The Guides*. His rating was based on 4 percent body as whole impairment for each upper extremity due to the carpal tunnel syndrome and lateral epicondylitis.

Dr. Bishop prepared a supplemental report dated November 9, 2018, in which he opined Claimant would need future medical treatment for her work injuries such as periodic medical evaluation, physical therapy, diagnostic testing and medication.

Dr. Bishop opined Claimant is capable of light physical demand work. He reviewed Mr. Benjamin's task list and opined that out of 21 tasks, Claimant could no longer perform 2 tasks for a task loss of 9.5 percent.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2015 Supp. 44-508(h) states:

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2015 Supp.44-510e(a)(2) states in part:

(B) The extent of permanent partial general disability shall be the percentage of functional impairment the employee sustained on account of the injury as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein until January 1, 2015, but for injuries occurring on and after January 1, 2015, based on the sixth edition . . .

(C) An employee may be eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment ("work disability") if:

(i) The percentage of functional impairment determined to be caused solely by the injury exceeds 7½% to the body as a whole or the overall functional impairment is equal to or exceeds 10% to the body as a whole in cases where there is preexisting functional impairment; and

(ii) the employee sustained a post-injury wage loss, as defined in subsection (a)(2)(E) of K.S.A. 44-510e, and amendments thereto, of at least 10% which is directly attributable to the work injury and not to other causes or factors.

In such cases, the extent of work disability is determined by averaging together the percentage of post-injury task loss demonstrated by the employee to be caused by the injury and the percentage of post-injury wage loss demonstrated by the employee to be caused by the injury.

(D) "Task loss" shall mean the percentage to which the employee, in the opinion of a licensed physician, has lost the ability to perform the work tasks that the employee

performed in any substantial gainful employment during the five-year period preceding the injury. The permanent restrictions imposed by a licensed physician as a result of the work injury shall be used to determine those work tasks which the employee has lost the ability to perform. If the employee has preexisting permanent restrictions, any work tasks which the employee would have been deemed to have lost the ability to perform, had a task loss analysis been completed prior to the injury at issue, shall be excluded for the purposes of calculating the task loss which is directly attributable to the current injury.

(E) "Wage loss" shall mean the difference between the average weekly wage the employee was earning at the time of the injury and the average weekly wage the employee is capable of earning after the injury. The capability of a worker to earn post-injury wages shall be established based upon a consideration of all factors, including, but not limited to, the injured worker's age, physical capabilities, education and training, prior experience, and availability of jobs in the open labor market. The administrative law judge shall impute an appropriate post-injury average weekly wage based on such factors. Where the employee is engaged in post-injury employment for wages, there shall be a rebuttable presumption that the average weekly wage an injured worker is actually earning constitutes the post-injury average weekly wage that the employee is capable of earning. The presumption may be overcome by competent evidence.

(i) To establish post-injury wage loss, the employee must have the legal capacity to enter into a valid contract of employment. Wage loss caused by voluntary resignation or termination for cause shall in no way be construed to be caused by the injury.

(ii) The actual or projected weekly value of any employer-paid fringe benefits are to be included as part of the worker's post-injury average weekly wage and shall be added to the wage imputed by the administrative law judge pursuant to K.S.A. 44-510e(a)(2)(E), and amendments thereto.

(iii) The injured worker's refusal of accommodated employment within the worker's medical restrictions as established by the authorized treating physician and at a wage equal to 90% or more of the pre-injury average weekly wage shall result in a rebuttable presumption of no wage loss.

(F) The amount of compensation for whole body injury under this section shall be determined by multiplying the payment rate by the weeks payable. As used in this section: (1) The payment rate shall be the lesser of: (A) The amount determined by multiplying the average weekly wage of the worker prior to such injury by 66⅔%; or (B) the maximum provided in K.S.A. 44-510c, and amendments thereto; (2) weeks payable shall be determined as follows: (A) Determine the weeks of temporary compensation paid by adding the amounts of temporary total and temporary partial disability compensation paid and dividing the sum by the payment rate above; (B) subtract from 415 weeks the total number of weeks of temporary compensation paid as determined in (F)(2)(A), excluding the first 15 such weeks; (3) multiply the number of weeks as determined in (F)(2)(B) by the percentage of functional

impairment pursuant to subsection (a)(2)(B) or the percentage of work disability pursuant to subsection (a)(2)(C), whichever is applicable.

(3) When an injured worker is eligible to receive an award of work disability, compensation is limited to the value of the work disability as calculated above. In no case shall functional impairment and work disability be awarded together.

The resulting award shall be paid for the number of disability weeks at the payment rate until fully paid or modified. In any case of permanent partial disability under this section, the employee shall be paid compensation for not to exceed 415 weeks following the date of such injury. If there is an award of permanent disability as a result of the compensable injury, there shall be a presumption that disability existed immediately after such injury. Under no circumstances shall the period of permanent partial disability run concurrently with the period of temporary total or temporary partial disability.

The ALJ ruled Claimant has an 8 percent body as a whole permanent impairment due to repetitive trauma to her bilateral upper extremities caused by her repetitive work activities she performed for Respondent based on Dr. Bishop's rating.

Dr. Bishop was asked by the Court to evaluate Claimant. The other two ratings offered into evidence were 6 percent body as a whole from Dr. Do, the treating physician, and 19 percent body as a whole rating from Dr. Murati, who was retained by Claimant. It is found and concluded Dr. Bishop's permanent impairment rating is the most persuasive. It reflects the opinion of the treating physician, but also takes into account Claimant's ongoing symptoms from her injuries.

Claimant has an 8 percent body as a whole impairment rating and thus she meets the threshold to be eligible for a work disability award.

The ALJ found Claimant was not eligible for a work disability award because he ruled her wage loss was 10 percent or less of her pre-injury average weekly wage. He ruled that Claimant has a post injury wage of \$611.20 based on the opinion of Mr. Benjamin. He further ruled that Claimant is capable of earning fringe benefits in the amount of \$148.00 per week.

Since Claimant ceased her employment with Respondent on October 1, 2017, Claimant has not had any employment where she was paid fringe benefits. Respondent argues if Claimant had not lost her job with Center Industries, she would have received fringe benefits after her first 90 days of employment, which would have resulted in little or no wage loss for Claimant. However, the fact remains Claimant still has not had employment since being employed with Respondent where she was paid fringe benefits.

The most consistent wage Claimant has earned since October 1, 2017, is \$13.00 per hour working 32 to 40 hours a week with no fringe benefits. It is found and concluded

that Claimant's post injury wage is \$520.00 per week, or \$13.00 per hour for 40 hours a week with no fringe benefits. This is a wage loss of 34 percent, which meets the statutory threshold for a work disability

The best indicator of Claimant's task loss is from Dr. Bishop, an opinion ordered by the Court. It is an impartial opinion and also takes into account the opinions of the treating physician. Claimant's task loss is 9.5 percent.

Claimant's permanent partial impairment based on work disability is 21.75 percent.

K.S.A 2015 Supp. 44-510h(e) states:

It is presumed that the employer's obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

Two doctors who testified in this case, including the doctor retained by the Court, opined Claimant needs future medical care such as physical therapy and medication. It is found and concluded Claimant is entitled to future medical treatment upon proper application.

Assessment of costs are discretionary with the administrative law judge.² The Board will not disturb discretionary rulings by an administrative law judge unless there is showing of an abuse of discretion. There is no such abuse established. It is a common for all expenses for neutral physicians appointed by the Court be paid by Respondent including depositions. The \$600.00 fee for Dr. Bishop's deposition shall be borne by Respondent.

CONCLUSIONS

² K.A.R. 51-9-6

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified. Claimant has a work disability impairment of 21.75 percent based on a 34 percent wage loss and 9.5 percent task loss.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Gary K. Jones dated March 30, 2020, is modified.

Claimant is entitled to an award due and owing of 42.57 weeks of temporary total disability at the rate of \$515.09 per week, or 21,298.06, followed by 30.99 weeks of permanent partial disability at the rate of \$515.09 per week or \$15,962.64, for an 8 percent functional impairment, and 53.28 weeks of permanent partial general work disability at the rate of \$515.09 per week, or 27,443.00, for a 21.75 percent work disability, making a total award of \$64,703.70, which is due and owing as of August 17, 2020.

IT IS SO ORDERED.

Dated this _____ day of August, 2020.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (Via OSCAR)

Terry Torline, Attorney for Claimant
Kelly Donley, Attorney for Respondent and its Insurance Carrier
Hon. Gary K. Jones, Administrative Law Judge